UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

BRIAN L. JONES, Petitioner, vs. JAMES McKINNEY, Warden, North Central Correctional Facility, Respondent.	No. C02-2032-MWB **REPORT AND RECOMMENDATION ON MOTION TO DISMISS**

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I. INTRODUCTION

This matter is before the court on the Renewed Motion to Dismiss (Doc. No. 30) filed by the respondent James McKinney ("McKinney") on December 3, 2002. The petitioner Brian L. Jones ("Jones") commenced this action by filing a petition for writ of *habeas corpus* on May 6, 2002. In Jones's original petition, he listed the State of Iowa as respondent. In response to the court's Initial Review Order, Jones filed an amended petition on June 6, 2002, correctly naming McKinney as the correct respondent.

On July 12, 2002, McKinney filed an answer to the petition (Doc. No. 10), and a motion to dismiss the amended petition with a supporting brief. (Doc. Nos. 11 & 12) With leave of court, Jones filed a second amended and substituted petition on November 19, 2002 (Doc. No. 27). On December 3, 2003, McKinney filed an answer to the second amended petition (Doc. No. 29), and a renewed motion to dismiss, incorporating his prior brief by reference. (Doc. No. 30) Jones, through his appointed counsel, filed a resistance and supporting brief on February 3, 2003 (Doc. Nos. 35 & 36) Jones also filed a *pro se* resistance, on February 28, 2003. (Doc. No. 38) McKinney filed a reply brief in support of his motion on February 10, 2003. (Doc. No. 37)

On July 30, 2002, Chief Judge Mark W. Bennett referred this matter to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. The court finds McKinney's motion has been fully submitted, and turns to consideration of the motion.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY IN STATE COURTS OF IOWA

On December 12, 1996, Jones was charged, in two criminal complaints filed in Black Hawk County, Iowa, with one count of Robbery in the First Degree, one count of Robbery in the Second Degree, and possession of marijuana. The robbery charges arose from

robberies of two motels in Waterloo, Iowa, on December 8 and 10, 1996. Significant evidence linked Jones to the robberies, including both physical evidence and identification of Jones from photo lineups by two witnesses. Jones also was caught on videotape during the second robbery.

Jones had an initial appearance on December 12, 1996, at which time bail was set, the Public Defender was appointed to represent Jones, and a preliminary hearing was scheduled for December 19, 1996. At the preliminary hearing, the court found sufficient evidence existed to bind Jones over for trial, and a three-count Trial Information was filed containing the two robbery charges and possession charge. Jones appeared for arraignment on December 30, 1996, and entered pleas of not guilty to each of the three charges. He requested a speedy trial, and trial was scheduled for February 18, 1997, with a pretrial conference scheduled for February 14, 1997. At the pretrial conference, Jones requested a continuance to allow him time to file motions to suppress. The court granted the continuance; set a deadline of February 17, 1997, for the filing of motions to suppress; and continued the trial to March 4, 1997.

Jones's trial counsel, Public Defender Nathan Callahan, filed timely motions to suppress evidence on February 17, 1997. In the first motion, Jones sought to suppress statements he had made to police after his arrest, and in the second motion, he sought to suppress the witnesses' identifications of him. The motions were scheduled for hearing on February 28, 1997. When the hearing commenced, the court determined attorney Callahan had a conflict of interest. Callahan was withdrawn, attorney David Mason was appointed to represent Jones, and the pretrial conference and trial were continued to March 14 and 17, 1997, respectively. The court also continued the hearing on the pending motions, noting a new date would be scheduled promptly if Jones's new counsel elected to pursue those motions.

Jones's suppression hearing was rescheduled and then continued several times, eventually to July 7, 1997. Jones's counsel took depositions of five witnesses prior to the scheduled hearing date. Included among the deponents were the two witnesses who had picked Jones out of the photo lineups.

When the suppression motions came on for hearing on July 7th, Jones's counsel announced that Jones had entered into a plea agreement with the State, and Jones wished to enter guilty pleas to the three charges. The following colloquy occurred between Mason and the court:

> THE COURT: . . . Mr. Mason, it's my understanding that your client wishes to enter a plea pursuant to a plea agreement; is that correct?
>
> MR. MASON: That's correct, Your Honor. It's my understanding that the – Mr. Jones will plead to Count I as amended, and I believe the State will amend that down to Robbery in the Second Degree. He will plead to Count II as charged and in Count III for time served.
>
> The defendant understands that as a part of the plea agreement it is the State's contention [sic] not to pursue Robbery in the First Degree on Count I, that the sentences on Count I and II, which will be 10 years each, will run consecutive.
>
> Mr. Jones is also aware of the 85 percent requirements which means that he will have to serve at least 85 percent of the sentence in order to be considered for parole. The other 15 percent apparently is made up by good time days in the institution.

(Transcript of Proceedings dated July 7, 1997, in *State v. Jones*, Case No. FECR068527, District Court in and for Black Hawk County, Iowa ("Tr.") at 2-3)

The court asked, "Mr. Jones, is this your understanding of the agreement?" and Jones answered, "Yes, it is." (Tr. at 3) Jones acknowledged his awareness of the 85 percent requirement, and the agreement that he would serve consecutive sentences. (Tr.

at 3-4) A few moments later, the court once again confirmed Jones's understanding of the 85 percent requirement and his agreement to serve consecutive sentences. (*Id.*)

The court asked Jones if he fully understood what he was charged with in each count, and Jones replied, "Yes, I do." (*Id.*) The court inquired of counsel if he had gone over the elements of each of the offenses with Jones, as well as the State's burden to prove those elements beyond a reasonable doubt at trial. Counsel responded in the affirmative. The court then asked Jones, "[D]o you feel you understand the elements of these offenses and specifically that means those things that the State would have to prove if the matter proceeded to trial?" Jones responded, "Yeah." (Tr. at 5)

Jones acknowledged his understanding that if he entered a guilty plea, there would not be a trial. The court went through Jones's right to a trial by jury, the presumption of innocence and the State's burden to prove his guilt; his right to confront and cross-examine witnesses, to call witnesses on his behalf, and to testify if he so desired; and his protection against self-incrimination. Jones indicated he understood all of his trial rights, and he further understood that by pleading guilty, there would not be a trial and he would be giving up each of those rights. (Tr. at 5-6)

The court granted the State's motion to amend Count I down to Robbery Second, and confirmed again that Jones understood he was agreeing to serve the maximum penalty on both Count I, as amended, and Count II. The court then, for a third time, asked Jones if he understood the two sentences would be consecutive, and he would have to serve 85 percent of his sentence. Jones responded, "Yes, I do." (Tr. at 6-7) Jones then pled guilty to Count III, possession of a controlled substance, and indicated he was pleading of his own free will, and not under threat or promise. (Tr. at 7)

The following colloquy then took place:

> THE COURT: It's alleged that Count I, Amended Count I, occurred on the 8th day of December, 1996; and it's

alleged that that occurred at the Park Inn International. Are you admitting to me that you committed that offense?

THE DEFENDANT: Yes, I am.

THE COURT: And why don't you tell me what you did, and speak up for the court reporter.

THE DEFENDANT: On that night me and – On that night me and other friends went to that hotel and robbed the hotel.

THE COURT: Okay. And may I rely on the Minutes of Testimony?

MR. MASON: Yes, Your Honor.

THE COURT: And, Mr. Mason, in your investigation of this, for Count I, does it show that I would be authorized in accepting the plea and that you believe there's a factual basis for me to do so?

MR. MASON: I believe that there's a factual basis to do so, Your Honor.

THE COURT: Is there anything else the State would like to add to the factual basis in Count I?

MR. FERGUSON: No, Your Honor.

THE COURT: Okay, Count II – Count II is alleged to have occurred on the 10th day of December, 1996, Robbery in the Second Degree against Sarah Thomas, an employee of the Exel Inn at 3350 University Avenue in Waterloo, Iowa. Are you admitting to having committed that offense?

THE DEFENDANT: Yes, I am.

THE COURT: Why don't you tell me what you did.

THE DEFENDANT: Again, me and other friends went to that hotel that night and robbed the hotel.

THE COURT: Okay. Did you get money at these hotels?

THE DEFENDANT: Yes, we did.

. . .

THE COURT: At both?

THE DEFENDANT: Yes.

THE COURT: May I rely once again on the Minutes of Testimony?

MR. MASON: Yes, Your Honor. My investigation shows that there's a factual basis.

THE COURT: Do you concur in your client's desire to enter pleas of guilty with regard to Counts I and II?

MR. MASON: Yes, Your Honor.

. . .

THE COURT: Okay. Count III, are you admitting you did have possession of marijuana on the 12th day of December, 1996?

THE DEFENDANT: Yes, I did.

(Tr. at 7-10)

The court explained to Jones that he would be required to make restitution of the sums taken from the hotels, and confirmed that Jones understood he would be responsible to make restitution. (Tr. at 10) After questioning Jones about the extent of his schooling, and confirming Jones had not taken alcohol or other drugs within the preceding 24 hours, the court accepted Jones's pleas of guilty to all three charges. (Tr. at 10-11)

Jones then indicated his desire to go straight to sentencing. The court explained the consequences of such an action to Jones, as follows:

THE COURT: Mr. Jones, we can go forward to immediate sentencing; but you're giving up certain rights by doing that. You're giving up your right to come back here for sentencing at least 15 days from today's date. You're also giving up your right to have a Presentence Investigation in front

> of me as the judge to use at the sentencing. I will still order it, and it will be sent to the Department of Corrections.
>
> And you're also giving up between now and the time set for sentencing your right to file post – post-plea motions. The most important one of those is a Motion in Arrest of Judgment where you would ask that your plea of guilty be thrown out because of any problems or irregularities in the taking of that plea. Usually that comes down to the issue of whether or not I, as the judge, asked you all of the questions I was supposed to ask you this morning.
>
> Do you understand that you're giving up all of these rights if you go forward to immediate sentencing today?

(Tr. at 12-13) Jones responded, "Yes," and indicated he still wanted to go to immediate sentencing. (Tr. at 13) The court asked Jones if there was anything further he wanted to say, and Jones responded, "No." (Tr. at 14) The court then sentenced Jones, in accordance with the terms of the plea agreement, to consecutive ten-year terms of imprisonment on each of the two robbery counts, and 60 days, with credit for time served, on the possession of marijuana charge. The court specifically ordered that the 85 percent rule applies to Jones's two ten-year sentences. (Tr. at 14-15) Finally, the court asked Jones if he understood the proceedings that had taken place at the hearing. Jones responded, "Yes, Your Honor." (Tr. at 15-16) Judgment and Sentence was entered against Jones on July 8, 1997.

On August 7, 1997, Jones filed a *pro se* Notice of Appeal and Application for Appellate Counsel. The notice listed no grounds, but simply stated Jones was appealing his conviction and sentence, and requesting counsel. Assistant Appellate Defender Dennis Hendrickson was appointed to represent Jones in the appeal. On January 21, 1998, Hendrickson wrote a letter to Jones, advising him that Hendrickson was moving to withdraw as appellate counsel. Hendrickson stated that after reviewing the transcript, he could find no preserved error that would allow Jones to challenge his conviction successfully. Hendrickson advised Jones that if he disagreed with that conclusion, he should write to the

Iowa Supreme Court Clerk, raise any issues he believed supported his appeal, and ask that another attorney be appointed to represent him. Counsel advised Jones to do so within 30 days. He also advised Jones to write to the Supreme Court Clerk to advise the court if he did not wish to pursue his appeal, and informed him that if he failed to write to the court at all, his appeal would be dismissed automatically. Hendrickson provided Jones with the address for the court clerk, and enclosed copies of his motion and brief to withdraw as appellate counsel.

On February 17, 1998, Jones sent a timely letter (filed by the court on February 19, 1998), to the Supreme Court Clerk in which he stated the following:

> My attorney, Dennis Hendrickson, informed me of his submitting a motion to withdraw as my appellate defender. He also informed me that if I would like my case to stay in the courts, that I needed to submit a letter letting you know of such desires.
>
> I do believe that I have a case, and I would appreciate it if you would accept my motion to stay regardless of his wishes to withdraw.

Jones wrote a second letter dated April 13, 1998, (filed by the court on April 20, 1998), inquiring about the "status of the Motion of Resistance (titled: Motion to Stay) in reference to the Motion to Withdraw filed by [his] appellate attorney."

On June 2, 1998, Jones sent a third letter to the court clerk (filed June 5, 1998), in which he again asked about the status of his case, with reference to his motion to keep the case open. He stated, in part:

> I have not received notice that either [prior] letter was received or filed with the Court. I am asking that I receive some information in regards to both of these letters as soon as possible. Until this matter is closed I cannot move forward with my case.
>
> I am also submitting the grounds for my case. They are as follows: (1) Ineffective counsel due to failure to preserve issues of violation of defendant 5th . . . amendment privilege

> (533 N.W.2d 538, Irving v. State (Iowa 1975)) (103 S. Ct. 2830, Oregon v. Bradshaw (U.S. Or. 1983) (101 S. Ct 1880, Edwards v. Arizona, (U.S. Ariz. 1981). (2) Failure of Trial Judge to substantially comply with Sisco requirements.

On July 21, 1998, the Iowa Supreme Court issued an order concluding, after an "independent review of the record," that Jones's appeal was frivolous, granting his attorney leave to withdraw, and dismissing the appeal pursuant to Iowa Rule of Appellate Procedure 104. Procedendo issued on July 30, 1998.

Jones filed an application for post-conviction relief ("PCR") in Black Hawk County on December 30, 1998. He listed the following grounds and factual allegations in support of his application:

> Plea was made as a result of coercion, plea was made under duress. Vilation [sic] of "Miranda Rule"[;] Failure of Counsel to preserve error, ineffective assistance of counsel, Error in proceedings during plea and sentencing hearing.
>
> Trial Judge and Attorney failed to fully explain nature of charges and to insure that I understood same. Failure to order a presentence investigation. Ineffective Assistance of Counsel.

An attorney was appointed to represent Jones in connection with his PCR application, and Jones, through counsel, filed an amended PCR application on April 12, 1999. In his amended application, Jones alleged his conviction or sentence was in violation of the Constitution of the United States or the State of Iowa, for the following reasons:

> (a) Trial counsel failed to conduct a thorough investigation of the facts and circumstances surrounding the offense, [and] as such [Jones] was denied effective assistance of counsel.
>
> (b) The trial counsel failed to employ the services of [a] private investigator to discover others involved in the offense and the extent and nature of their involvement.

> (c) Trial counsel failed to advance the Motion to Suppress, and prematurely accepted a plea bargain knowing his young client depended upon his advice.

Jones asked for either a new trial or, in the alternative, a new sentencing hearing.

Jones's PCR application came on for trial on March 16, 2000.[1] The only witness at the PCR trial was Jones's trial attorney, David Mason. Mason testified he explained to Jones the consequences of agreeing to two ten-year, consecutive sentences. If Jones were convicted at trial, the maximum penalties he would be facing were twenty-five years on County I (Robbery First), and ten years on Count II (Robbery Second). In Mason's experience, he believed it was likely a judge would order the sentences on the two counts to run concurrently, rather than consecutively, so Jones would have been facing at least a twenty-five year sentence if he were convicted. Under the terms of the plea agreement, Jones would only face a twenty-year sentence, of which he would serve a minimum of seventeen years under the 85% rule. (*See* PCR Tr. at 7-8; *see also* PCR Tr. at 27-28)

Mason was unable to confirm that he had done any research on the two suppression motions that were pending at the time he took over representing Jones, although he was able to articulate the issues in the two motions, and he confirmed that he took several depositions in the case. (PCR Tr. at 8-11) He also confirmed that he had reviewed all the police reports, Minutes of Testimony and attachments filed in the case prior to advising Jones to plead guilty. (PCR Tr. at 9-13)

One issue raised by Jones's PCR attorney regarding the suppression motions was the fairness of the photo lineup shown to the witnesses. The witness/victim at the first robbery said the suspect had a mustache, and at the second robbery, two days later, the

[1] Although not entirely clear from the record, it appears at least a portion of the lengthy delay between the time Jones's PCR application was filed and the trial date was due to several judges recusing themselves from trying the case because of their familiarity with Jones's mother, who was an employee in the First Judicial District.

witness/victim said the suspect had a mustache and beard. Apparently, in the photo lineups shown to these witnesses, Jones was the only person with a visible beard and mustache. (*See* PCR Tr. at 32-34) Mason agreed that would have been one issue explored in the suppression hearing, had it taken place. Another issue was a report by one of the witnesses that she had seen someone resembling the person who had robbed her driving by her hotel, at a time when Jones was in police custody. (*See* PCR Tr. at 34) Another individual was located who fit the description of the robber, and a second photo lineup was prepared, but there is no indication the second photo lineup was shown to the original complaining witnesses. (*See* PCR Tr. at 36-38)

Mason acknowledged the existence of these issues, and others, relating to the State's case against Jones. He elaborated at length on his tactical reasons for determining it was in Jones's best interests to accept the plea bargain rather than proceeding to trial. Among other things, he repeatedly referred to the fact that Jones had confessed to him that he had participated in the robberies. Mason believed his knowledge that Jones was guilty would be problematic if Jones wanted to testify on his own behalf at a trial. (*See* PCR Tr. at 38-46) Other factors that influenced his advice to Jones included the inherent uncertainties present in going to trial, the possibility that Jones might want to take responsibility for what he had done, the fact that codefendants had, or potentially could, come forward to testify against Jones, and Jones's incriminating statements to the police. He also considered the possibility that if they lost the suppression motion, the State might withdraw its plea offer. Mason testified he discussed all of these matters in detail with Jones, and Jones made the final decision to accept the State's plea offer, and plead guilty to the charges. (*See* PCR Tr. at 46-51)

Mason stated he spent a substantial amount of time discussing the case with Jones, and Jones had access to the Trial Information, all the Minutes of Testimony, and all the police reports. Taking all the factors into consideration, Jones decided to plead rather than

risk going to trial. (PCR Tr. at 51-52, 57) Mason testified it was "quite clear that the decision [to plead guilty] was Mr. Jones'[s], and given the nature of the case, given the fact that his mom works here, I was very careful in trying to handle this case and advise my client as best as possible." (PCR Tr. at 53) Mason testified he did not coerce Jones into pleading guilty. (PCR Tr. at 58)

Jones's PCR counsel argued the totality of the advice Mason provided to Jones led to Jones's decision to plead guilty; that advice was based on inadequate research and comprehension of the issues, and therefore was ineffective; and consequently, Jones was unable to make a fully-informed decision to plead guilty. (PCR Tr. at 81-83)

On March 21, 2000 (filed March 28, 2000), the Black Hawk County court entered judgment against Jones on his PCR application. The court found that at the time of Jones's plea, Mason was aware of all the suppression issues, and had discussed them with Jones on more than one occasion. The court further found Mason was aware of, and had discussed with Jones, numerous other factors of concern in his case, including the possibility that others who participated in the crimes might testify against Jones, Jones's confession to Mason of his involvement in the crimes and the effect of that confession on defense strategy in the case, and Jones's belief that he should take responsibility for his actions. The court noted Jones had communicated at length with his attorney throughout the pendency of the case, and after reviewing all of the relevant concerns with his attorney, Jones elected to accept the plea offer, which, although "not remarkably favorable," offered "a guarantee of avoiding the worst case outcome if [Jones] went to trial and was convicted on both charges." (PCR opinion attached to Doc. No. 16, at p. 3)

In discussing its legal conclusions, the PCR court first noted the existence of some ambiguity regarding the circumstances under which Jones's appeal was dismissed, and what claims actually were raised in the appeal. The court resolved the ambiguity in Jones's favor, "address[ing] the merits of his petition on the assumption that his claims were

properly preserved in the appellate process." (*Id.*) The court noted that with regard to Jones's ineffective assistance of counsel claim, the underlying proceeding at issue was Jones's guilty plea proceeding. The court found Jones "failed to establish any shortcoming in the underlying plea proceeding," noting Mason was fully aware of all the issues, had discussed them at length with Jones, and "Mason's understanding of the situation was balanced and realistic." (PCR opinion, p. 4)

Regarding the other issues raised by Jones in the PCR trial, the court held as follows:

> The Court declines to indulge in an analysis of the underlying issues brought to the Court's attention by Plaintiff Jones. In the context of the guilty plea proceeding, the plaintiff has failed to carry his burden on either element of proof for postconviction actions. He has not established that Attorney Mason failed in any essential duty regarding the guilty plea proceeding nor has he established that the result would have been different if Attorney Mason had done more research or developed a more in-depth understanding of the issues. The plaintiff's plea was voluntarily and intelligently entered. He understood his rights and the consequences of pleading guilty. The most that can be said is that he has changed his mind about his bargain but that is insufficient reason to set it aside.

(PCR opinion, pp. 4-5)

Jones appealed from the denial of his PCR application, arguing the PCR court had erred in failing to find his trial counsel was ineffective. The Iowa Court of Appeals summarized Jones's claim as follows:

> Specifically, [Jones] argues counsel breached his duty of zealous representation in failing to pursue the motions to suppress. Jones also argues that he should be entitled to withdraw his guilty plea because the plea colloquy was deficient. He contends the district court failed to determine that he understood the elements of the crimes charged or the associated mandatory minimum and maximum possible punishments.

(PCR Appellate opinion, attached to Doc. No. 16, at pp. 3-4)

The appellate court found Jones's ineffective assistance of counsel claim failed on procedural grounds, explaining its conclusion as follows:

> Ineffective assistance of counsel claims premised on counsel's failure to investigate or file a motion to suppress do not survive the entry of a valid guilty plea. *See Speed v. State*, 616 N.W.2d 158, 169 (Iowa 2000). Any consideration of Jones's claims concerning counsel's pre-plea representation is therefore contingent on our disposition of Jones's challenge to the validity of his guilty pleas.
>
> The State correctly notes that Jones's failure to file a motion in arrest of judgment precluded any challenge to the validity of Jones's guilty pleas on direct appeal. *See* Iowa R. Crim. P. 23(3)(a) [now Rule 2.24(3)(a)]. Failure to do so, however, will not preclude such a challenge in these proceedings if the failure to file a motion in arrest of judgment resulted from ineffective assistance of counsel. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996) (citing *State v. Schoelerman*, 315 N.W.2d 67, 71 (Iowa 1982)).
>
> Neither Jones's resistance to appellate counsel's motion to withdraw or petition for postconviction relief cites counsel's failure to file a motion in arrest of judgment as grounds for relief. As a result, Jones is precluded from challenging the validity of his guilty plea in these proceedings. *Id.* Because Jones entered a presumptively valid guilty plea, any claims of ineffective assistance of counsel based on counsel's pre-plea performance are also precluded. *Speed*, 616 N.W.2d at 159.

(*Id.*, at pp. 4-5)

The Iowa Court of Appeals therefore affirmed the PCR court's judgment. (*Id.*) The Iowa Supreme Court, *en banc*, denied further review on March 15, 2002, and Procedendo issued on March 27, 2002.

III. THE PARTIES' POSITIONS REGARDING DISMISSAL

McKinney argues the claims raised by Jones in his petition for writ of *habeas corpus* are procedurally defaulted, as found by the Iowa Court of Appeals. He argues further that the Iowa court's denial of Jones's PCR action rested on independent and adequate state law grounds, and therefore the decision is not cognizable for review by this court. Finally, McKinney argues Jones has failed to exhaust his claim that his guilty plea was not knowing and voluntary in violation of due process, and in any event, that claim is based on state procedural grounds and does not present a federal claim. (*See* Doc. No. 30)

Jones argues he has shown cause and prejudice to allow his ineffective assistance of counsel claim to proceed despite procedural default. He further argues he fairly presented his due process claim to the state courts, and the claim presents a viable federal question for this court's review.

The court turns now to consideration of the issues raised by the parties.[2]

IV. DISCUSSION

A. Ineffective Assistance of Counsel Claim

McKinney argues the Iowa Court of Appeals based its denial of Jones's ineffective assistance of counsel claim on independent and adequate State procedural grounds, and therefore, the denial does not present grounds for a federal *habeas* action. (*See* Doc. No. 30, p. 4) In *Bounds v. Delo,* 151 F.3d 1116 (8th Cir. 1998), the Eighth Circuit Court of Appeals noted

> the Supreme Court has recognized that "it is not the province of a federal habeas court to reexamine state-court determina-

[2]Jones also raised, in his initial petition, a claim relating to the ineffectiveness of his PCR counsel. McKinney correctly noted such a claim is not viable in federal court. There is no right to counsel in a PCR action; thus, there can be no cognizable claim for ineffective assistance of PCR counsel, either as an independent claim or as "cause" for procedural default. *See Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999), *and Cornell v. Nix*, 976 F.2d 376, 381 (8th Cir. 1992) (both citing *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991)).

> tions on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Instead, our review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68, 112 S. Ct. 475; *see also* 28 U.S.C. § 2241. Determinations of state law made by the [state courts] are binding. *See Crump v. Caspari*, 116 F.3d 326, 327 (8th Cir. 1997).

Bounds, 151 F.3d at 1118. *See Lee v. Kemna*, 534 U.S. 362, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002); *Pruett v. Norris*, 153 F.3d 579, 584 (8th Cir. 1998). The first inquiry, therefore, must be whether the Iowa Court of Appeals based its decision on independent and adequate state law grounds.

Under the Iowa Rules of Criminal Procedure, a defendant who fails to challenge the adequacy of a guilty plea proceeding by filing a motion in arrest of judgment is precluded from asserting such a challenge on appeal. Iowa R. Crim. P. 2.24(3)(a) (formerly Iowa R. Crim. P. 23(3)(a)). A motion in arrest of judgment must be made within 45 days after the guilty plea is entered, but *no later than* five days before the date set for pronouncing judgment. Iowa R. Crim. P. 2.24(3)(b). Thus, a defendant who elects to proceed directly to sentencing is unable to bring a motion in arrest of judgment, except orally at the sentencing, which would be highly unlikely when sentencing immediately follows the guilty plea.

The Iowa Supreme Court has carved out an exception to this rule in cases where the failure to file a motion in arrest of judgment results from the ineffective assistance of counsel. *See State v. Brooks*, 555 N.W.2d 446 (Iowa 1996); *State v. Schoelerman*, 315 N.W.2d 67 (Iowa 1982). Under the exception, a defendant must show counsel failed to perform an essential duty, and the defendant was prejudiced by counsel's error. *Brooks*, 555 N.W.2d at 448 (citing *State v. Terry*, 544 N.W.2d 449, 453 (Iowa 1996)). The *Brooks* court explained that counsel fails to perform an essential duty "if defense counsel allows the defendant to plead guilty to a charge for which no factual basis exists and thereafter

fails to file a motion in arrest of judgment challenging the plea." *Id.* (citations omitted). The court explained further:

> On the other hand, where a factual basis exists for the plea, counsel usually will not be found ineffective for allowing the defendant to plead guilty. [Citations omitted.] Thus, the pivotal issue in this case is whether a factual basis existed for [the defendant's] guilty plea to the crime. . . . If a factual basis existed, counsel was not ineffective for failing to file a motion in arrest of judgment; if a factual basis does not exist, then counsel was ineffective.

Id.

In affirming the denial of Jones's PCR application, the Iowa Court of Appeals based its decision solely on the fact that Jones failed to cite, as a specific ground for appeal, his counsel's failure to file a motion in arrest of judgment. The court did not address the possible ineffectiveness of counsel that would, if proven, logically have resulted in the failure to file such a motion, and consequently also did not consider whether a factual basis existed for Jones's plea. It seems axiomatic that if ineffective assistance of counsel leads to the entry of a guilty plea, that ineffectiveness would encompass a failure to file a motion in arrest of judgment. If counsel deemed his or her advice to be effective and the plea to be valid, why would counsel deign to file a motion in arrest of judgment? Moreover, it is not enough, as McKinney suggests (*see* Doc. No. 12, pp. 9-10), that because the Iowa court relied only on state procedural law, no federal question has been preserved with respect to Jones's Sixth Amendment right to counsel. An essential component of the inquiry into whether the Iowa court based its decision on independent *and adequate* state law grounds must be whether the Iowa court correctly applied the particular Iowa procedural rules upon which the court relied.

Fortunately, in the present case, the court is not required to wade deeper into this procedural quagmire because Jones does not contest the Iowa court's holding that his Sixth

Amendment claim was procedurally defaulted. Instead, he argues that even in the face of procedural default, his claim may proceed in this court if he shows cause for the procedural default and prejudice resulting therefrom. (Doc. No. 36, pp. 1-4[3])

"[A]ny prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief." *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783 (1982); *accord Maynard v. Lockhart*, 981 F.2d 981, 984 (8th Cir. 1992) ("A state procedural default bars federal habeas review unless the petitioner 'can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.' *Coleman v. Thompson*, [501] U.S. [722, 750], 111 S. Ct. 2546, 2565, 115 L. Ed. 2d 640 (1991).") "In the absence of a finding of cause and prejudice, a federal court is precluded from reviewing procedurally defaulted claims on its own motion." *Maynard*, 981 F.2d at 985 (citing *Stewart v. Dugger*, 877 F.2d 851, 854-55 (11th Cir. 1989) (subsequent history omitted)).

As cause for the procedural default, Jones cites counsel's ineffectiveness itself, noting that constitutionally ineffective assistance of counsel can constitute sufficient cause to allow the court to consider a defaulted argument. (Doc. No. 36, p. 2, citing *Wyldes v. Hundley*, 69 F.3d 247, 253 (8th Cir. 1995); *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645-2646, 91 L. Ed. 2d 397 (1986)) Jones argues he was prejudiced because his counsel's ineffectiveness caused him to enter a plea that was not a voluntary and intelligent admission of guilt.

To determine whether any ineffectiveness constituted cause for Jones's procedural default on the underlying ineffectiveness claim, the court must consider whether Jones's counsel was ineffective in the first instance. In considering a claim of ineffective assistance of counsel, whether on the merits of a *habeas* claim or as cause for procedural

[3]Page 2 of Jones's brief is erroneously numbered 4, resulting in two pages numbered 4. The court refers here to the first four pages of the brief, without regard for their numbering.

default, the court uses the two-pronged test formulated by the United States Supreme Court in *Strickland v. Washington*:

> *First*, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) (emphasis added). The reviewing court must determine "whether counsel's assistance was reasonable considering all the circumstances." *Id.*, 466 U.S. at 688, 104 S. Ct. at 2065.

The defendant's burden is considerable, because "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*, 466 U.S. at 689, 104 S. Ct. at 2065 (citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 83 (1955)). "Reasonable trial strategy does not constitute ineffective assistance of counsel simply because it is not successful." *James v. Iowa*, 100 F.3d 586, 590 (8th Cir. 1996).

Even if the defendant shows counsel's performance was deficient, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. "Representation is an art, and an act or omission that is

unprofessional in one case may be sound or even brilliant in another." *Id.*, 466 U.S. at 693, 104 S. Ct. at 2067.

Thus, the prejudice prong of *Strickland* requires a petitioner, even one who can show that counsel's errors were unreasonable, to go further and show the errors "actually had an adverse effect on the defense. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test." *Id. See Boysiewick v. Schriro*, 179 F.3d 616, 620 (8th Cir. 1999) (citing *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997)). Rather, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

A petitioner must satisfy both prongs of *Strickland* in order to prevail on an ineffective assistance of counsel claim. *See id.*, 466 U.S. at 687, 104 S. Ct. at 2064. It is not necessary to address the performance and prejudice prongs in any particular order, nor must both prongs be addressed if the district court determines the petitioner has failed to meet one prong. *Id.*, 466 U.S. at 697, 104 S. Ct. at 2069. Indeed, the *Strickland* Court noted that "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Tokar v. Bowersox*, 198 F.3d 1039, 1046 (8th Cir. 1999) (citing *Strickland*).

In short, a conviction or sentence will not be set aside "solely because the outcome would have been different but for counsel's error, rather, the focus is on whether 'counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.'" *Mansfield v. Dormire*, 202 F.3d 1018, 1022 (8th Cir. 2000) (quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993)).

Applying these standards to the facts of the present case, the court finds Jones has failed to show both that his counsel was ineffective, and that even if counsel had been ineffective, that Jones was prejudiced by his counsel's performance. The record before the Black Hawk County court at the time of Jones's guilty plea presented a satisfactory factual basis to support the plea. Jones's guilt was evidenced by a videotape of him committing one of the robberies, the similarity between his physical characteristics and clothing with those described by the complaining witnesses, witness identifications, and Jones's own statements to police. The record indicates Jones's attorney discussed the case fully with him, including the existence of strategic advantages inherent in accepting the plea agreement. Although counsel's failure to inform a criminal defendant who chooses to plead guilty of the relevant facts and law "is 'deficient performance' sufficient to satisfy the first prong of the 'ineffective assistance' analysis," *Wanatee v. Ault*, 39 F. Supp. 2d 1164, 1172 (N.D. Iowa 1999) (citations omitted), Jones has failed to show his counsel failed to perform an essential duty, or that the result of the guilty plea proceeding was fundamentally unfair. Given the strength of the evidence against Jones, and the fact that he would be facing a longer sentence if he were convicted at trial, Jones cannot show a reasonable probability exists that, but for his counsel's errors, the result would have been different. *See Wanatee*, 39 F. Supp. 2d at 1173.

Having failed to show adequate cause and prejudice to overcome the procedural default of Jones's underlying ineffective assistance of counsel claim, the decision of the Iowa Court of Appeals that the claim is barred on procedural grounds must stand. Accordingly, the court finds Jones has failed to state an ineffective assistance of counsel claim that is cognizable in this court, and McKinney's motion to dismiss this claim should be granted.

B. Due Process Claim

The second prong of McKinney's motion to dismiss relates to Jones's claim that his guilty plea was not knowing and voluntary, in violation of his right to due process. McKinney argues this claim is procedurally defaulted for the same reason as Jones's other claims; that is, he failed to file a motion in arrest of judgment, precluding any attack on the guilty plea proceeding. McKinney also argues this claim is unexhausted, and further, that Jones rests his claim solely on State procedural grounds that do not present a federal question for this court's review. Jones argues he did, in fact, properly exhaust this claim in the Iowa courts, and he has presented a federal question for review in this proceeding. Further, as in the case of his first claim, Jones argues that even if the court finds this claim to be procedurally defaulted, he can show cause and prejudice for the default.

The court first will discuss whether Jones's due process claim is exhausted, which entails consideration of whether Jones presented a federal constitutional question to the Iowa courts for review. Then the court will discuss whether this claim is procedurally defaulted.

1. Exhaustion of State remedies

The United States Supreme Court explained in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999):

> Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court. In other words, the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition. The exhaustion doctrine . . . however, raises a recurring question: What state remedies must a habeas petitioner invoke to satisfy the federal exhaustion requirement?

Id., 526 U.S. at 842-43, 119 S. Ct. at 1731 (citations omitted). Similarly, subsection 2254(c), 28 U.S.C. § 2254(c), provides:

> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Thus, the court must determine whether Jones has exhausted all avenues to raise his second claim in the Iowa state courts.

Jones wrote a *pro se* letter to the Iowa Supreme Court Clerk on February 17, 1998, asking that his appeal not be dismissed, but not citing any specific grounds for appeal. In a subsequent letter, Jones raised as an assertion of error, "Failure of Trial Judge to substantially comply with *Sisco*[4] requirements." Although the letter was received by the Iowa Court of Appeals prior to its dismissal of Jones's appeal, that court failed to address Jones's grounds for appeal in its order granting appellate counsel's motion to withdraw and dismissing the appeal as frivolous. The PCR court found the dismissal of Jones's appeal presented a "troubling ambiguity," and gave Jones the benefit of the doubt on this point, agreeing to address the merits of Jones's PCR petition "on the assumption that his claims were properly preserved in the appellate process." (PCR opinion, at p. 3)

Although Jones failed to articulate his *Sisco* claim as grounds for relief in his PCR petitions, both the PCR court and the Iowa Court of Appeals recognized that Jones had raised the issue. The PCR court held as follows:

> The underlying proceeding at issue is [Jones's] guilty plea. Guilty pleas are governed by I.R.Cr.P. 8(2)(b). The rule requires the Court to determine that the defendant understands the nature of the charges he is pleading to, the maximum possible punishment and any mandatory minimum punishment.

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[4] Jones's claim refers to *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969), in which the Iowa Supreme Court held that before accepting a guilty plea, a judge must determine a factual basis exists to support the plea, and must inquire of the defendant to ensure he understands the charges against him, is aware of the penal consequences of his plea, and is entering his plea voluntarily.

> In addition, because constitutional rights are being waived, guilty pleas must be voluntary. State v. White, 587 NW2d 240, 241-242 (Iowa 1998). Plaintiff Jones has failed to establish any shortcoming in the underlying plea proceeding.
> . . .
>
> The Court declines to indulge in an analysis of the underlying issues brought to the Court's attention by Plaintiff Jones. . . . The plaintiff's plea was voluntarily and intelligently entered. He understood his rights and the consequences of pleading guilty.

(PCR opinion, attached to Doc. No. 16, at 4, 5)

On its review of the denial of Jones's PCR application, the Iowa Court of Appeals noted that in the PCR trial, Jones "challenged the validity of his guilty pleas citing the court's failure to inquire into Jones's understanding of the nature of the crimes charged or applicable penalties." (PCR Appellate Opinion, attached to Doc. No. 16, at p. 3) The court further framed the issues for review as follows:

> On appeal Jones contends the trial court erred in failing to find trial counsel was ineffective. . . . Jones also argues that he should be entitled to withdraw his guilty plea because the plea colloquy was deficient. He contends the district court failed to determine that he understood the elements of the crimes charged or the associated mandatory minimum and maximum possible punishments.

(*Id.*, at pp. 3-4)

The Iowa Court of Appeals did not address the merits of this argument, finding this claim, like Jones's ineffective assistance of counsel claim, was precluded on procedural grounds. The court held Jones was "precluded from challenging the validity of his guilty plea" because of his failure to file a motion in arrest of judgment.

If Jones fairly presented his claim to the Iowa courts, then the claim is exhausted despite the Iowa court's failure to address its merits. *See Castille v. Peoples*, 489 U.S. 346, 350-51, 109 S. Ct. 1056, 1059-60, 103 L. Ed. 2d 380 (1989) ("[W]hether the exhaustion

requirement of 28 U.S.C. § 2254(b) has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court, and, indeed, in this case, vigorously opposed in the State's brief."). The court finds Jones offered the Iowa courts an opportunity to rule on his *Sisco* claim. However, a question still exists as to whether Jones "fairly presented the *federal constitutional dimensions* of his federal habeas corpus claim to the state courts." *Laws v. Armontrout*, 834 F.2d 1401, 1412 (8th Cir. 1987) (emphasis added), *aff'd*, 863 F.2d 1377 (8th Cir. 1988) (*en banc*), *cert. denied*, 490 U.S. 1040, 109 S. Ct. 1944, 104 L. Ed. 2d 415 (1989). This is the crux of McKinney's second challenge to Jones's *Sisco* claim; that is, the claim he has presented is based on Iowa law, and does not present a federal question.

The Eighth Circuit Court of Appeals has explained repeatedly:

> Before a federal court may reach the merits of a claim in a *habeas* petition by a state prisoner, it "must first determine whether the petitioner has fairly presented his federal constitutional claims to the state court." *See Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (*per curiam*); *McCall v. Benson*, 114 F.3d 754, 757 (9th Cir. 1997). "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, *or a state case raising a pertinent federal constitutional issue in a claim before the state courts*." *McCall*, 114 F.3d at 757 (internal quotations omitted).

Frey v. Schuetzle, 151 F.3d 893, 897 (8th Cir. 1998) (emphasis added). *See also Sweet v. Delo*, 125 F.3d 1144, 1153 (8th Cir. 1997) ("Raising a state-law claim in state court that is merely similar to the constitutional claim later pressed in a habeas action is insufficient to preserve the latter for federal review.") (citing *Abdullah v. Groose*, 75 F.3d 408,l 411 (8th Cir. 1996) (*en banc*); *Gray v. Netherland*, 518U.S. 152, 162, 116 S. Ct. 2074, 2081,

135 L. Ed. 2d 456 (1996) ("holding that general appeal to broad concept such as due process is insufficient presentation of issue to state court")).

With respect to his claim that a defective plea colloquy violated his right to due process, Jones made no reference to a federal constitutional claim in the PCR action, and only the slightest passing reference to a federal constitutional claim in his appellate brief. In his brief to the Iowa Supreme Court, Jones argued "Constitutional issues" were being "asserted in a challenge to a guilty plea proceeding," and "[f]undamental due process requires that the guilty plea be voluntary and intelligent." (Appellant's Brief & Argument in *Jones v. Iowa*, No. PCCV081796, Sup. Ct. No. 00-0782, filed May 7, 2001, at 30) Thereafter, Jones cited only Iowa case law and procedural rules in support of his argument, failing to pursue his general reference to a federal constitutional claim.

Jones notes, however, the Iowa Supreme Court has recognized that the plea colloquy requirements set forth in *Sisco* derive from federal due process standards, and thus are mandatory under both the Iowa and United States Constitutions. (Doc. No. 36, p. 5, citing *Brainard v. State*, 222 N.W.2d 711, 713-14 (Iowa 1974)). Therefore, Jones argues his "mention of *Sisco*, and later reiteration in both his Resistance to [the] 104(b) Brief and Post Conviction Relief [application] that he did not fully understand the nature of the plea was sufficiently presented to the Iowa Court as a federal question." (Doc. No. 36, p. 5) The court finds Jones's argument has merit.

In *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969), the Iowa Supreme Court adopted the American Bar Association Minimum Standards for Criminal Justice on Pleas of Guilty ("ABA Standards"), specifically ABA Standards 1.4, 1.5, 1.6 and 1.7. ABA Standard 1.4 provides that in deciding whether or not to accept a defendant's plea of guilty or nolo contendere, the court first should address the defendant personally to determine whether the defendant understands the nature of the charge, to inform the defendant of the jury trial rights that will be waived by entering a plea, and to inform the defendant:

> "(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;
> (ii) of the mandatory minimum sentence, if any, on the charge; and
> (iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment."

Sisco, 169 N.W.2d at 547 (quoting ABA Standard 1.4). ABA Standard 1.5 requires the court to determine that the plea is voluntary, and not the result of promises, force or threats other than promises contained in the plea agreement. ABA Standard 1.6 requires the court to determine a factual basis exists before entering judgment, specifically providing:

> "Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea."

Sisco, 169 N.W.2d at 548. The *Sisco* court noted, "Briefly stated, these standards are, in essence, an exemplification of Rule 11, Federal Rules of Criminal Procedure." *Id.*

The *Sisco* court further held:

> [A] sentencing court may not abrogate or delegate to anyone, including attorney for accused, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or existence of facts supporting it.

Id. The court explained an accused must, himself, make "a reasoned choice"; it is not enough that an accused's attorney recommends pleading guilty. *Id.* The *Sisco* court cited numerous authorities from the United States Supreme Court and federal appellate courts in support of its conclusion that these requirements must be met to afford a defendant constitutional protection. Although a trial court's determination of these matters does not

"require[] any ritualistic or rigid formula," *id.*, the court held that "substantial compliance with [these] standards . . . is mandatory in all indictable misdemeanor and felony cases where a plea of guilty is entered by an accused." *Sisco*, 169 N.W.2d at 551. *See United States v. Jackson*, 627 F.3d 883, 885 (8th Cir. 1980) ("A district court need not follow an exact ritual when complying with the dictates of Rule 11.")

The *Sisco* court further held that a verbatim record should be made of guilty plea proceedings, and the record should evidence "'(i) the court's advice to the defendant . . ., (ii) the inquiry into the voluntariness of the plea . . ., and (iii) the inquiry into the accuracy of the plea. . . .'" *Id.* (quoting ABA Standard 1.7).

The Iowa Supreme Court noted its conclusions were supported by *Boykin v. State of Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), in which the United States Supreme Court held, "'It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary.'" *Sisco*, 169 N.W.2d at 550 (quoting *Boykin*, 395 U.S. at 242, 89 S. Ct. at 1711). The court quoted at length from *Boykin*, noting "'[s]everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial.'" *Id.*, 169 N.W.2d at 551 (quoting *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1711).

In *State v. Brainard*, 222 N.W.2d 711 (Iowa 1974), the Iowa Supreme Court reiterated its reliance on *Boykin*, and its obligation to determine, in postconviction appeals of guilty plea proceedings, whether there has been substantial compliance "with *Sisco* and federal constitutional standards." *Brainard*, 222 N.W.2d at 713. Among other things, the *Brainard* court noted:

> In *Sisco*, we also acknowledged the applicability to state guilty plea proceedings of federal due process standards delineated in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969) The requirements of *Boykin* are thus

> superimposed upon the American Bar Association standards adopted in *Sisco*.

Brainard, 222 N.W.2d at 714.

Given the Iowa Supreme Court's consistent reliance upon federal constitutional standards in considering appeals of guilty plea proceedings, the court finds Jones's claim that the requirements of *Sisco* were not met fairly presented a federal constitutional issue for the Iowa courts' review. In citing *Sisco*, Jones "referred to a . . . state case raising a pertinent federal constitutional issue in a claim before the state courts." *Frey*, 151 F.3d at 897. Accordingly, the court finds Jones has exhausted his state remedies on this claim.

2. Procedural default

Despite the fact that Jones has exhausted available state remedies on his due process claim, the question remains as to whether this claim was procedurally defaulted due to Jones's failure to file a motion in arrest of judgment. The analysis of this question is, in virtually all respects, identical to the analysis of whether Jones's ineffective assistance of counsel claim was procedurally defaulted for the same reason. Simply put, to avoid procedural default for failing to file a motion in arrest of judgment, Jones would have to show cause for that failure, and resulting prejudice.

Jones again cites his counsel's ineffectiveness as cause for his failure to properly preserve his due process issue. (*See* Doc. No. 36, pp. 6-7) He cites as prejudice the fact that counsel's ineffectiveness caused him to enter a plea that was not knowing and voluntary. The court has found previously that Jones's counsel was not ineffective, defeating the cause prong of this argument. Even if Jones could show his counsel was ineffective, however, the court finds no prejudice resulted to Jones. The record indicates a proper plea colloquy was conducted by the trial court, despite the court's failure to discuss

with Jones every element and aspect of the charged crimes. As the Iowa Supreme Court explained in *State v. Marsan*, 221 N.W.2d 278 (Iowa 1974):

> This defendant erroneously assumes that trial courts in this jurisdiction must in every plea hearing extract from the accused a confession which factually satisfies each element of the crime charged. In an opinion filed concurrently with this decision, *State v. Hansen*, 221 N.W.2d 274 (Iowa 1974), we disposed of that issue adversely to [the] defendant.
>
> The court's finding of factual support for the plea may be foundationed in part on the minutes of testimony attached to the county attorney's information. *State v. Quinn*, 197 N.W.2d 624, 625 (Iowa 1972); *State v. Abodeely*, 179 N.W.2d 347, 353 (Iowa 1970); *State v. Vantrump*, 170 N.W.2d 453, 455 (Iowa 1969).
>
> We see no logic in a rule which would compel a court to reject a guilty plea intelligently and voluntarily offered by a defendant when the latter's statements, coupled with the balance of the record before the court, persuasively point to the commission of a crime and the guilt of the accused. Under such circumstances, neither the United States nor Iowa Constitutions, in our view, require that defendant be subjected to the trauma of trial or the State subjected to the expense of litigating a dead issue.

Marsan, 221 N.W.2d at 280; *accord Polly v. State*, 355 N.W.2d 849, 856 (Iowa 1984) (minutes of testimony may provide factual basis for guilty plea). *See also Gonzales v. Grammar*, 848 F.2d 894, 898 (8th Cir. 1988) (noting *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970), added to *Boykin* a "new element" that "the record must affirmatively disclose that a defendant who pleaded guilty entered his plea *understandingly* and voluntarily"); *Jackson*, 627 F.2d at 885 (guilty plea upheld where "the trial court painstakingly ensured that the defendant was made aware of the myriad of rights he possessed and would forfeit in the event he pled guilty").

Because Jones has failed to show both cause and prejudice to overcome the procedural default of his due process claim, McKinney's motion to dismiss this claim should be granted.

V. CERTIFICATE OF APPEALABILITY

A prisoner must obtain a certificate of appealability from a district or circuit judge before appealing from the denial of a federal *habeas* petition. *See* 28 U.S.C. § 2253(c). A certificate of appealability is issued only if the applicant makes a substantial showing of the denial of a constitutional right. *See Roberts v. Bowersox*, 137 F.3d 1062, 1068 (8th Cir. 1998). The court finds Jones has failed to make a substantial showing of the denial of a constitutional right, and recommends a certificate of appealability not be issued.

VI. CONCLUSION

For the reasons discussed above, **IT IS RECOMMENDED**, unless any party files objections[5] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that McKinney's motion to dismiss be **granted**, and judgment be entered in favor of McKinney and against Jones.

IT IS SO ORDERED.

DATED this ____ day of April, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[5]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).